Supreme Court U.S.
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No.

In the Supreme Court of the United States

SHERRY OVERHOLT and MARK OVERHOLT,
Petitioners,

v.

MONTVILLE TOWNSHIP, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether a township's complete failure to promulgate any policy or procedure for the documentation and investigation of citizen complaints involving constitutional violations by its police officers is so plainly "obvious" that the decision not to address it constitutes deliberate indifference *per se* under 42 U.S.C. § 1983 and *City of Canton, Ohio v. Harris*.

2. Whether excessive use of force liability under 42 U.S.C. § 1983 requires that police officers make physical contact with, or physically injure, Petitioners.

3. Considering the facts in a light most favorable to Petitioners, whether the Fourth Amendment's prohibition of the excessive use of force was violated by defendants' conduct in compiling an affidavit in support of a warrant that contained admittedly false statements, amassing and utilizing a SWAT Team of over 13 heavily armed and masked men with long guns drawn, unannounced, invading their home at 2:10 a.m., causing them permanent injuries, and without informing them of the existence of a warrant.

Parties Involved

Petitioners Mark and Sherry Overholt; Defendant Montville Township; Defendant Patrolman Terry P. Grice; Defendant Sergeant Derek A. Bauman; Defendant Officer Chris Ryba; Defendant Medina County; Defendants Medina County SWAT Team Members; and Defendant Sheriff Hassinger.

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RULE

Supreme Court Rule 13.1 1

Opinions Below

The ruling of the United States Court of Appeals for the Sixth Circuit, Case No. 05-3118, dated February 24, 2006 affirming the decision of the District Court for the Northern District of Ohio, Eastern Division, is not officially reported, and can be found at *Overholt v. Montville Twp.*, 2006 U.S. App. LEXIS 5021 (6th Cir. 2006) and is reproduced at App. A at 1a.

The decision and order of the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 1:03 CV 1469, granting all of the defendants' motions for summary judgment dated December 24, 2004, is not reported and is reproduced at App. A at 5a.

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on February 24, 2006. This Petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This Court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Statutory and Constitutional Provisions Involved

The relevant statutory provision is 42 U.S.C. § 1983, which states the following:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The relevant constitutional provision is the 4th Amendment to the United States Constitution, which states the following:

Unreasonable searches and seizures.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and 1343 (general federal question

jurisdiction) since Petitioners' claims arose under 42 U.S.C. § 1983. The Petitioners' claims are based upon allegations that the county, township and their officers violated their civil rights.

Petitioners Mark and Sherry Overholt own and operate a family business that manufactures hydraulic swabbing rigs and other specialty equipment and has been in business in Montville Township, Medina County, Ohio since 1925. Mark is 60 years old and Sherry is 55 years old. They live in a home directly adjacent to their business. On July 24, 2003, trespassers conducting dangerous work at the Overholts' shop were verbally evicted from the premises by Petitioner Mark. When they refused to leave, Mark feared for his safety and fired shots up into the air. The trespassers left.

That evening, the trespassers filed a report with Officer Grice of the Montville Township Police Department alleging that Mark had discharged his weapon in their direction. At approximately 9:15-9:30 p.m. on July 24, 2002, Officer Grice went to the Overholt property and conducted surveillance. Officer Grice then obtained a search warrant for the Overholt home and business. Thereafter, Officers Grice and Ryba sought assistance from the County's SWAT Team in executing the warrant.

Petitioner Mark Overholt holds deep politically conservative beliefs, especially regarding big government and its intrusion into the lives of citizens. Specifically, he has advocated and lobbied in favor of the legal abolishment of the Township's Police Department. Petitioner Mark Overholt had previously sent a letter to the Department *firing* them for what he perceived to be double-taxation from the County and Township and has had previous discussions with Sheriff Hassinger about his feelings that the police department was

incompetent. These beliefs and opinions are widely known in Montville, especially by members of the Township Police Department, which has resulted in admitted tension between the Overholts and Montville Township prior to July 24, 2002.

At approximately 2:10 a.m. on July 25, 2003, Sergeant Bauman and Sheriff Hassinger knocke on the door of the Overholt home. Sherry was awakened and found Sheriff Hassinger and Sgt. Bauman at her door. Sheriff Hassinger told Sherry that he wished to speak with Mark and refused to inform her of the reason for his request. They demanded that she wake him up while they waited. At no time did either Sgt. Bauman or Sheriff Hassinger inform the Overholts that they had a search warrant or an alleged arrest warrant prior to the forced entry by Township and County officers. Sherry went back to the bedroom and Mark shortly appeared.

Upon reaching the front door, Mark, wearing only his underwear shorts, informed them that he would speak with them in the morning and turned around and began walking away. At this point the Medina County SWAT Team, whose faces were covered in black masks, and with side arms drawn, forcibly broke into the back door while Officer Ryba and other members of the SWAT Team came in the front door screaming. With guns pointed at Sherry and officers screaming at her, Sgt. Bauman ran past Petitioner Sherry as Mark was *walking* into the hallway. Sherry immediately sat on a rocking chair due to shoulder pain which she was experiencing from a torn rotator cuff. An unidentified masked member of the SWAT team violently shoved Petitioner Sherry's face and cheek and told her to get down on the ground, which she did. Sherry suffered a bruised cheek, further injury to her shoulder and rotator cuff and has since attended numerous sessions with a therapist as a result.

Simultaneously, Sgt. Bauman and another unidentified SWAT Team member pushed and jumped on top of Mark causing his body to strike the floor in the hallway. As a result, Mark suffered multiple bruises on his body and a broken toe. The SWAT Team and Montville Police then searched the entire home and businesses.

At no time did either Sherry or Mark appear armed or make any verbal threats toward any member of Township police or County's SWAT Team. Defendant Bauman did not know whether there were any guns in the bedroom as he was jumping on Petitioner Mark. Officer Grice, although allegedly in possession of an arrest warrant, never informed anyone of its existence nor did he serve Petitioners with it at that time. It is undisputed that none of the alleged events leading to the issuance of the search warrant took place in or around Plaintiffs' home. After the home invasion, Sheriff Hassinger apologized to Mark.[1]

A. Summary of Allegations

Petitioners claim that the Township's failure to have any policies or procedures to document and investigate citizen complaints of unreasonable use of force constitutes deliberate indifference.[2] In addition, Petitioners allege that individual

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[1] Criminal charges were brought against Mark resulting from the incident involving the trespassers, but a jury acquitted him of all counts except one Misdemeanor of the Fourth Degree, which was later reversed on appeal.

[2] Petitioners also claim that Montville Township has an official policy or custom of failing to promulgate adequate polices or procedures regarding securing search warrants, entry and search of homes pursuant to search warrants, the utilization of the county SWAT Team, and training and supervision in the proper use of force.

defendants, which included numerous county and township officers, as well as the county's SWAT Team members, violated their rights under color of law in illegally securing and executing a search warrant for their home and in using unreasonable and excessive force in executing the search warrant.

B. The Decisions Below

The district court found that many of Petitioners' claims against individual defendants fail simply because of a "lack of personal involvement." Dist. Ct. Dec., App. A at 12a. The court also found that § 1983 liability for an excessive use of force claim must involve "physical contact" with Petitioners. Dist. Ct. Dec., at App. A at 16a. The court did not acknowledge the evidence submitted by Petitioners that Officer Grice lied in his affidavit regarding relevant facts in support of his request for a search warrant, and it found that Officer Grice was entitled to summary judgment on the ground that he was executing a facially valid search warrant. Dist. Ct. Dec., at App. A at 13a.

As for the county and township defendants, the district court found that since there was no underlying constitutional violation committed by the agents of either the county or the township, they cannot be liable under §1983. Dist. Ct. Dec., at App. A at 18a. The court summarily dismissed Petitioners' allegations that Petitioners were injured as a direct result of Montville Township not having any policy, procedure or guideline with regards to documenting, investigating and/or reporting complaints or injuries suffered by citizens during the officers' execution of arrest or search warrants since Petitioners, the court explained, failed to present any evidence of deliberate indifference. Dist. Ct. Dec., at App. A at 20a-21a.

The Sixth Circuit adopted the entirety of the findings and analysis of the district court and concluded that "the issuance of a detailed opinion * * * would be duplicative and would serve no useful purpose." 6th Cir. Dec., at App. A at 4a.

Reasons for Granting the Petition

The district court far departed from the accepted and usual course of judicial proceedings and the Sixth Circuit Court of Appeals sanctioned such a departure which calls for an exercise of this Court's supervisory power. As a result of this departure, the lower court decided an important question of federal law that has not been, but should be, settled by this Court.

1. Whether a township's complete failure to promulgate any policy or procedure for the documentation and investigation of citizen complaints involving constitutional violations by its police officers is so plainly "obvious" that the decision not to address it constitutes deliberate indifference *per se* under 42 U.S.C. § 1983 and *City of Canton, Ohio v. Harris*.

Petitioners' arguments are straight forward: Indifferent law enforcement entities should not be rewarded for their failure to document and investigate complaints against their own officers involving constitutional violations of the rights of citizens which they are charged with protecting. Undersigned counsel submits that although this exact issue has not been addressed by this Court, a common sense analysis of the underlying public policy and precedent which led to the promulgation of the "policy or custom" requirement indicates that the arguments submitted by Petitioners below are entirely consistent with such a requirement. In other words, granting political subdivisions the prerogative in having policies which

protect constitutional rights, or whether to properly train its officers if such policies exist, would undoubtedly encourage such entities not to have these policies, or if they did have them, not to document violations. This in turn has a direct and lethal effect on a majority of "policy or custom" cases, leaving meritorious cases and injured plaintiffs without a forum to vindicate their constitutional rights.

Keeping in mind that these same entities are in the best position to maintain records of citizen complaints against their officers, and the fact that potential claimants will probably never have access to this information if not maintained by these entities, it would be unfair to allow for the unintended consequence of granting these entities the "option" to document the same.

The law is well-settled that a township,[3] as well as an individual, can be found liable under 42 U.S.C. § 1983. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694-95 (1978). A township, however, may be held liable only when the execution of its official custom or policy is actually responsible for the deprivation of constitutional rights, i.e. the township itself must be to blame (causation) for the custom or policy, or the lack thereof. The policies for which *Monell* holds a township accountable are the official actions or practices that establish the operative rules of action which guide the conduct of subordinate employees. It cannot be disputed that training and supervision are an important part of the process by which a city makes and announces policy. *Monell*, 436 U.S. at 691. For police officers, training and

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[3] As there is no constitutionally significant distinction between municipal and township liability, Respondents rely on case-law dealing with municipalities as being applicable to townships.

supervision are the exclusive manner in which a township announces and implements its policies regarding the protection of constitutional principles. A local government *can* be found liable if certain conduct by its high ranking officials whom are policymakers is, or could be, attributed to it. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). In addition, a single constitutional violation could constitute an "official policy or custom." *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

In *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), this Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact[,]" *id.*, at 388., and officers are not protected by the affirmative defense of qualified immunity involving compensatory damage claims. *Owen v. City of Independence,* 455 U.S. 622 (1980). In a failure to train case, "liability may be imposed on a [township] upon a showing of deliberate indifference exhibited by a pattern of inadequate training, supervision and discipline of police officers provided that there is a causal connection between such inadequacies and the risk of harm to others." *Parker v. District of Columbia*, 271 U.S. App. D.C. 15 (D.C. Cir. 1988). It is this causation requirement that is at the heart of this petition.

The adequacy of the training was framed as being the issue in *City of Canton*, "and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy.'" *Id.*, at 390. This Court recognized that where the need of "more or different" police training is "so obvious" that the inadequacy of the training is likely to result in violation of constitutional rights, the policymakers of a city are said to be deliberately indifferent to the

constitutional rights of their citizens. *Id.* (because city policymakers certainly know that their police officers carry deadly weapons, "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious[]' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights.") However, in the case at bar, it is the absolute failure to have any policy or procedure in place that is alleged. It is not the adequacy of the policy, procedure or training that is at issue, but the complete lack thereof.

This Court has not squarely addressed the causation requirement under these circumstances. Federal courts have, however, extended *City of Canton* beyond the failure-to-train context and have held that a municipality that fails to investigate or effectively respond to citizen complaints may be liable for constitutional deprivations resulting from that failure under §1983. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3rd Cir. 1996) (reversing summary judgment in favor of city upon finding that evidence creates a jury question as to whether Pittsburgh's investigatory procedures against officers were adequate); *Vann v. City of New York*, 72 F.3d 1040 (2nd Cir. 1995) (summary judgment reversed where there exists a question of fact as to whether police system showed deliberate indifference in monitoring complaints); *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991); *Bordanaro v. McLeod*, 871 F. 2d 1151 (1st Cir. 1989) ("The absence of a strictly enforced disciplinary system led the officers * * * to believe they were above the law and would not be sanctioned for their misconduct."); *Fiacco v. City of Rensselaer*, 783 F.2d 319

(2d Cir. 1986).[4] In essence, *City of Canton* created a now well-accepted basis of township liability for a less than total disregard for the protection of citizens' rights and the obvious lack of deterrence of unconstitutional behavior under color of law which such inadequacy perpetuates.

Montville Township police officers testified that they were not aware of any township policy that would mandate the documentation of injuries to citizens, physical altercations, heated arguments or threats which would transpire during police-citizen encounters. Petitioners submit that the constitutional violations they sustained resulted directly from this failure.

Most modern police departments do not adopt explicitly unconstitutional policies and procedures. But constitutional violations by police officers may result just as surely due to the municipality's failure to have a policy or having a policy but failing to train its officers on the proper methods of executing such policy. This Court has determined that violations of constitutional rights are likely to occur where a

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[4] Federal District Court Cases: *Gonzalves v. City of New Bedford*, 939 F. Supp. 915 (D. Mass 1996) (imposing municipal liability on City Council and Mayor); *Hogan v. Franco*, 896 F. Supp. 1313 (N.D.N.Y. 1995) (summary judgment in favor of Utica, New York, denied); *Illiano v. Clay Township*, 892 F. Supp. 117 (E. D. Pa. 1995); *Carney v. White*, 843 F. Supp. 462 (E.D. Wis 1994); *Brown v. City of Margate*, 842 F. Supp. 515 (S.D. Fla. 1993) (holding that informal resolution of complaints without written documentation is sufficient to establish deliberate indifference; "The City must, however, acknowledge that allegations of a police department's failure to maintain thorough and accurate records of citizen complaints- if substantiated- could be considered evidence of deliberate indifference.").

police department has no written policy, but trains its officers to enter homes if an arrest warrant is in hand, or has a written policy requiring compliance with all Fourth Amendment doctrines, but does not train its officers as to the requirements of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573 (1980).

An allegation of failure to adequately respond to citizen complaints raises the question of whether the risk of constitutional deprivation was so "plainly obvious" that the decision not to address it "reflected deliberate indifference on the part of the policymaker." *Clark v. Pena*, 2000 U.S. Dist. LEXIS 6660, *15 (U.S. Dist. Ct. W. D. MI., April 28, 2000). In the absence of evidence of prior constitutional violations, a plaintiff may allege an "obvious need to train." *Gold v. City of Miami*, 151 F.3d 1346, 1352 (11th Cir. 1998). The Sixth Circuit did not even consider whether Montville Township's failure to have any policies or procedures in place to document and investigate the conduct of its officers created an 'obvious' potential for future constitutional violations. A persistent failure to discipline creates an "inference that a municipality has ratified conduct, thereby establishing a 'custom' within the meaning of *Monell*." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985) (citing *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983); *see also Kindle v. City of Harvey*, 2002 U.S. Dist. LEXIS 2408 (D. Ill. 2002). This Court has further determined that a single constitutional deprivation by a city's employee may suffice for deliberate indifference. *Bryan County v. Brown*, 520 U.S. 397, 408 (1997) ("In *Canton* we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability.").

The causation requirement was explained in *Bryan County* as requiring Petitioners "to show that the municipality's indifference led directly to the very consequence that was so predictable." *Id.*, at 410. The case at bar is distinguishable from *Bryan County* with respect to causation: It was without a doubt predictable that the lack of a citizen complaint procedure by Montville Township would lead to the use of excessive force.

The lack of *any* procedure or policy regarding the documentation and investigation of citizens' complaints against the Township's police force is the functional equivalent of a total lack of discipline of officers interacting daily with the township's citizens. Montville Township's ability to effectively supervise its officers is also significantly hampered by the lack of any formal method of archiving the citizen complaints it received, creating an environment where police misconduct goes unchecked. As the 3rd Circuit Court of Appeals so eloquently cautioned in *Beck v. City of Pittsburgh*, 89 F.3d at 974, "because there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated immunity * * *."

It cannot be disputed that a police officer's primary function is to investigate reports of criminal activity. If officers do not investigate, an *obvious* result would be an increase in criminal activity since perpetrators of crime will feel that their actions will go unpunished and therefore not be deterred. In no other case is this more true than when the perpetrator is a police officer.

It follows then, and numerous courts of appeals have held, that a township's complete failure to maintain an adequate system of disciplining officers who act unconstitutionally is also actionable under Section 1983. *See, e.g., Bielevicz v.*

Dubinon, 915 F.2d 845, 852-53 (3rd Cir. 1990) (acquiescence to custom of arresting individuals without probable cause sufficient to support municipal liability); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247-48 (6th Cir. 1989) (failure to investigate and supervise jailkeeper's deplorable treatment of paraplegic inmates sufficient to support municipal liability); *Harris v. City of Pagedale*, 821 F.2d 499, 504-06 (8th Cir. 1987) (failure to take remedial action against known pattern of sexual misconduct by police officers sufficient to support municipal liability); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 326 (2nd Cir. 1986) (failure to investigate claims of police brutality sufficient to support municipal liability).[5]

In *Cox v. District of Columbia*, 1994 U.S. App. LEXIS 30756, *1 (D.C. Cir., Oct. 28, 1994), the Court of Appeals for the District of Columbia affirmed a district court's holding that the "District government's failure to ensure the timely processing of citizen complaints against police officers" amounted to deliberate indifference which "caused plaintiff to be deprived of his constitutional rights, in violation of 42 U.S.C. § 1983." *See Cox v. District of Columbia*, 821 F. Supp. 1 (D.C. Dist. Ct. 1993). In coming to this conclusion, the court of appeals utilized a four-prong test in finding a

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[5] *See Vineyard v. County of Murray*, 990 F.2d 1207, 1212 (11th Cir. 1993); *Rhyne v. Henderson County*, 973 F.2d 386, 392-93 (5th Cir 1992); *Oviatt v. Pearce*, 954 F.2d 1470, 1478 (9th Cir. 1992); *Gibson v. City of Chicago*, 910 F.2d 1510, 1521-22 (7th Cir. 1990); *see also Vogelsang v. County of Cayuga*, 1998 U.S. Dist. LEXIS 3848, 1998 WL 146293, at *5-6 (N.D.N.Y. Mar. 25, 1998); *Doe v. Estes*, 926 F. Supp. 979, 987-88 (D. Nev. 1996); *Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 445-47 (D.N.J. 1992); *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610, 623-24 (D.N.J. 1990); *Timberlake v. Benton*, 786 F. Supp. 676, 696 (M.D. Tenn. 1992).

constitutional violation: (1) an underlying constitutional violation (a finding by the lower court that officers used excessive force); (2) custom or practice (maintaining a patently inadequate system of investigation of excessive force complaints); (3) deliberate indifference (the policy or custom showed a deliberate indifference to the rights of persons who came in contact with District police officers); and (4) causation (the District's policy or custom caused the excessive use of force). *Id.* at 11-20.

Cox interpreted *City of Canton* accurately that there "must be a substantive connection between the particular defect in training and the officer's wrongful act." 1994 U.S. App. LEXIS 30756, at *7, f.n. 2. In addition, that appellate court found that it was reasonable to conclude that "the absence of any timely disciplinary procedure and the pattern of uninvestigated complaints of excessive force would predictably result- and resulted in this case- in further incidents of excessive force." *Id.*, at *7 (citing *Bielevicz*, 915 F.2d at 851 ("it is logical to assume that the continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future.")).[6]

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[6] In essence, patent inadequacies in the enforcement of policies and procedures regarding the investigation of alleged serious police misconduct allows the behavior to go unchecked, and provides no deterrent thus allowing officers to "violate constitutional rights with impunity." 1994 U.S. App. LEXIS 30756, at *8; *see* also *Clark v. Pena*, 2000 U.S. Dist. LEXIS 6660, *3 (U.S. Dist. Ct. W. D. MI., April 28, 2000) (City had an official citizen complaint investigation policy, but had a custom of not investigating verbal citizen complaints).

The decision not to train is unquestionably a course of action deliberately "chosen from among various alternatives." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Indeed, to the extent a township does not train or supervise officers because its policymakers did not even consider their responsibility to do so, the fault is *more* manifest. Liability should not be avoided by an abdication of governmental responsibility. The training, supervision and discipline of police officers are universally accepted norms, and the decision not to train or to train in a grossly negligent manner constitutes a policy no different than any other consciously chosen practice. In this case, liability based on failure to train is consistent with this Court's repeated assertion that municipal liability is to be based on notions of "fault." *See Monell*, at 692; *Tuttle*, at 818). Petitioners submit that this Court should, consistent with its long history of placing blame where it belongs, place the heavier burden of proof of causation upon the irresponsible entity once a plaintiff has satisfactorily alleged sufficient facts for a *prima facie* showing of a complete failure of responsibility to document and investigate reports of abuse by its own police force.

As a jury is in the best position to answer the question of whether an identified deficiency in the township's training or policy was closely related to the ultimate injury caused to citizens, *City of Canton*, at 391, by affirming the grant of summary judgment, the Sixth Circuit effectively usurped the function of the finder of fact and denied Petitioners their day in court. In the case at bar, the failure of the lower court to recognize the existence of a genuine issue of material fact as to whether a direct causal link exists between Montville Township's deliberate indifference to citizen complaints and its officers' assault on Petitioners should be reversed since Defendant Montville Township knew to a moral certainty that its officers will be required to use force against citizens, and

having armed its officers with firearms and authority, the need to have a citizen complaint policy and investigation procedures were so predictable and obvious that the failure to do so constitutes *per se* deliberate indifference.

2. Whether excessive use of force liability under 42 U.S.C. § 1983 requires that police officers make physical contact with, or physically injure, Petitioners.

This Court has not previously considered whether personal involvement for Section 1983 liability requires actual physical contact or resulting physical injury. The court below found that Sheriff Hassinger, Officer Grice and Officer Ryba "cannot be liable because they had no physical contact with either of the Overholts." Dist. Ct. Dec., at App. A at 16a. As a result, the district court then concluded that because there was no underlying constitutional violation committed by the individual defendants, neither the County nor the Township may be held liable under §1983. Dist. Ct. Dec., at App. A at 18a. The Sixth Circuit agreed. 6th Cir. Dec., at App. A at 3a.

The Fourth Amendment's ban on unreasonable seizures prohibits the use of excessive force during an arrest. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Phelps v. Coy*, 286 F.3d 295, 299 (6th Cir. 2002). The Fourth Amendment requires that a police officer's use of force be objectively reasonable, and courts must balance the consequences to the individual against the government's interests in effecting the seizure. *Graham*, 490 U.S. at 395. The "objective reasonableness" standard is comprised of a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case. Courts evaluating the reasonableness of force used "should pay particular attention to the severity of the

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Darrah v. City of Oak Park*, 255 F.3d 301, 307 (6th Cir. 2001). *Graham* made no mention of physical contact or physical injury as being prerequisites to a § 1983 violation. However, the Sixth Circuit, in the case at bar, relied heavily upon these two factors in its factual findings that there was no physical contact between certain defendants and Petitioners, and that Petitioners' injuries were not "especially serious[,]" in finding that defendants' use of force was not unreasonable. 6th Cir. Dec., at App. A at 17a.

In addition, a cursory reading of the district court's decision, which was entirely incorporated by the 6th Circuit, reveals that the court heavily utilized the four-pronged approach to excessive use of force cases popular in the time period prior to *Graham*, which included such factors as (I) the need for the application of force, (I) the relationship between the need and the amount of force that was used, (iii) the extent of injury inflicted, and (iv) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973). However, this analysis was expressly rejected by *Graham* and the court below erred when it applied the wrong test and failed to follow *Graham*.

The above notwithstanding, Sergeant Bauman admitted to jumping on Mark, along with an unidentified SWAT Team member, immediately upon Mark's actions in turning around inside his home. There was no evidence presented at the court below that any of the Officers or SWAT Team Members were immediately, or at anytime before, threatened by the Overholts. No one disputes that Mark was wearing

only his underwear and could not have concealed any weapons on his person. Moreover, the evidence was clear that any resistance by Mark took place only after he was violently attacked by at least two law enforcement officers inside his home and without anyone informing him that there existed a warrant of any kind. All of this was under way as 15 other SWAT Team members and Montville police officers broke down the back door to Petitioners' home and, with long guns drawn and faces completely covered with face masks, invaded Petitioners' home and assaulted his wife, Sherry.

The evidence was undisputed that, at the least, these defendants helped in securing the premises in order for the warrant execution to take place. In addition, Sheriff Hassinger's approval of the SWAT Team's use was a necessary component of the search and his attempts to allegedly appease Mark into surrendering clearly was meant to facilitate the search.

Petitioners submit that securing the premises is an integral part of the execution of a search warrant. This Court has not yet addressed this issue. However, at least one circuit court is of the opinion that the action of securing the premises and executing a search warrant are one of the same. The Eighth Circuit is of the opinion that, "[t]here is no constitutionally cognizable distinction between a 'search' for items and a 'securing of the premises' during execution of a warrant. *Ginter v. Stallcup*, 869 F. 2d 384 (8th Cir. 1989).

In order to analyze the individual defendants' participation in the search, one must determine the parameters of the acts which constitute a search. As applied to the current facts, the above case law outlines a search to include all actions following the initial decision to execute a search. It is undisputed that the SWAT Team was contacted during the

planning stages of the execution of the search warrant. All actions flowing from Montville Township's decision to conduct surveillance and then secure a search warrant, including but not limited to the decision to use the SWAT team, Sheriff Hassinger's active approval, and the SWAT Team's subsequent actions in furtherance of the search, are essentially inseparable parts of the search process.

To find, as the district court has, that Sheriff Hassinger, Officer Grice and Officer Ryba were not "physically involved" in the use of excessive force because they did not "physically touch" the Overholts is in error. This Court should adopt and follow the sound findings as set by the Eighth Circuit where it found that physical involvement should be construed to extend to all persons involved in the planning, securing and searching aspects of warrant execution.[7]

Sixth Circuit cases have heavily utilized the absence of physical contact as a factor in finding that excessive force could not have taken place. *See Burnette v. Gee*, 137 Fed. Appx. 806, 810 (6th Cir. 2005) (Sheriff's charge towards a person cannot itself be construed as excessive force, as it did not involve any physical contact); *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986) (finding that a high speed chase itself could not constitute excessive force where there was no physical contact with the suspect being chased); *Thomas v.*

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[7] Also, the County admitted that at least three of its SWAT Team members made physical contact with Mark and Sherry. However, since they were wearing black face masks, Petitioners were unable to identify which officers caused their injuries. This was, ostensibly, the reason the district court failed to address the SWAT Team member's liability.

Ivezaj, 1997 U.S. App. LEXIS 32347, * 7-10 (6th Cir. 1997) (As police officer's unchallenged testimony was that he had no physical contact with Thomas during the execution of a warrant, excessive use of force may not lie). Other courts, including the Sixth Circuit, have found that excessive force claims are sustainable where the use of force did not involve physical contact. *See Cornwell v. Dahlberg*, 963 F.2d 912, 915 (6th Cir. 1992); *Holmes v. City of Massillon*, 78 F.3d 1041, 1048 (6th Cir. 1996); *Martin v. Board of County Comm'rs*, 909 F.2d 402, 406 (10th Cir. 1990) (Actual physical contact is not a necessary component of a claim for unreasonable force).

Courts have also recognized excessive force claims where the force is expressed by means other than physical contact. *Gumz v. Morrissette*, 772 F.2d 1395, 1399-1402 (7th Cir. 1985) (evidence of a display of deadly force was sufficient to support a jury finding that arresting officers maliciously had used excessive force, although the court ultimately rejected the plaintiff's 42 U.S.C. § 1983 claim because of a lack of injury); *see also Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) (unwarranted display of firearm and threat to shoot held sufficient basis for jury verdict for plaintiff); *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992) (pointing a gun to the head of plaintiff and threatening to shoot could amount to a constitutional violation); *Holland v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001) (suggesting that using a SWAT team may constitute excessive force); *Katorie v. Dunham*, 108 Fed. Appx. 694, 700 (3rd Cir. 2004).

The Fifth Circuit has gone further in concluding that significant injury is an element of an excessive force claim, *Johnson v. Morel*, 876 F.2d 477, 479-80 (5th Cir. 1989); *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1229 (5th Cir. 1988) (in § 1983 suit, excessive force claim was not

sustainable where there was no evidence of physical injury) and the First Circuit has adopted *Hinojosa's* holding. *See Aponte Matos v. Toledo Davila*, 135 F.3d 182, 191 (1st Cir. 1998). The Tenth and Sixth Circuits have disagreed with this expansive requirement. *Smith v. Wampler*, 108 Fed. Appx. 560, 565 (10th Cir. 2004) ("Viewed under the totality of the circumstances, we conclude Wampler's conduct, even in the absence of physical injury, constituted excessive force * * * in violation of the Fourth Amendment."); *Ingram v. City of Columbus*, 185 F.3d 579, 597 (6th Cir. 1999) (plaintiff may allege use of excessive force even where the physical contact between the parties did not leave excessive marks or cause extensive physical damage); *Holmes v. City of Massillon*, 78 F.3d 1041, 1048 (6th Cir. 1996) (upholding excessive force claim where plaintiff alleged that officers used excessive force in removing her wedding ring).

In the end, only a perverse reading of the rule in these cases could conclude that "officers can employ whatever threat or nonphysical force they want, regardless of the amount of injury inflicted, so long as no physical contact exists." *Martin*, 909 F.2d at 406-407. The *Martin* Court explained that the proposition that officers "cannot be held liable simply because they did not actually strike the operative 'blows' is untenable and [the] claim to innocent ignorance of any contrary standard of conduct is disingenuous." *Id.*

It is for these reasons that Petitioners urge this Court to grant a writ of certiorari and address these important constitutional issues once and for all.

3. Considering the facts in a light most favorable to Petitioners, whether the Fourth Amendment's prohibition on the excessive use of force was violated by defendants' conduct in compiling an affidavit in support of a warrant that contained admittedly false statements, amassing and utilizing a SWAT Team of over 13 heavily armed and masked men with long guns drawn, unannounced, invading their home at 2:10 a.m., causing them permanent injuries, and without informing them of the existence of a warrant.

Reference is made to the *Graham v. Connor* discussion, *supra*. While "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment," *Graham*, 490 U.S. at 396, "pushes and shoves, like other police conduct, must be judged under the Fourth Amendment standard of reasonableness." *Saucier*, 121 S. Ct. at 2160. "The whole course of conduct of an officer in making an arrest or other seizure--including verbal exchanges with a subject--must be evaluated for Fourth Amendment reasonableness in light of the totality of the circumstances." *Holland v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001).[8]

"The decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force--force far greater than that normally applied in police encounters with citizens." *Id.* It is this extraordinary force that makes "'dynamic entry' a

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[8] In the case at bar, unlike in *Holland*, there was no reason for defendants to be concerned about Petitioners' or other's safety and defendants admit that Petitioners had no history of violence.

viable law enforcement tactic in dealing with difficult and dangerous situations." *Id.* This decision must be reasonable since it is determinative of the manner in which the search is carried out, "thereby determining the extent of the intrusion on the individual's Fourth Amendment interests." *Id.*; *Garner*, 471 U.S. at 8. As such, it cannot be argued that any officer in charge would not anticipate that the SWAT Team would utilize excessive force if activated.

Officer Grice testified he had no evidence that the crime allegedly committed by Mark took place at the Overholt home, yet he signed an affidavit stating that the crime took place at the home. Moreover, Officer Grice testified that he heeded the recommendation of a prosecutor that he agree with her language in the affidavit which alleged that the crime "may still be ongoing" at the residence while he knew that he did not have "good cause" to believe this to be true. Officer Grice "had no evidence" that the crime may be ongoing" or that any portion of the alleged crime took place at Petitioners' residence. Moreover, Defendant Grice testified that he had no evidence that the Overholts were destroying evidence. As a matter of fact, Officer Grice admitted that the police report he prepared stated that the alleged crime had taken place in the parking lot of the Overholt business and not the home. Curiously, Officer Grice did not ask the judge authorizing the search warrant to also authorize Mark's arrest. It remains Petitioners' contention that no arrest warrant was filed prior to Mark's arrest. When he went by the Overholt home a few hours after the trespassing incident, Officer Grice found nothing out of the ordinary. Also, when all of the officers arrived at the Overholt home at 2:00 a.m., the lights were off and there was no indication whatsoever that the crime was still ongoing at the home, let alone in the parking lot of the business. The early morning home invasion, however, went forward.

Sergeant Herte's concerns that there may be weapons in the bedroom also tend to show that there was no arrest warrant in existence at that time,[9] and even if there were, at least some members of the SWAT Team and Township Officers were not aware of its existence. However, a true question of fact remained as to whether (I) Officer Grice lied to the county judge in getting the night search warrant issued, and (ii) an arrest warrant was attested to and issued[10] by the clerk of court prior to 2:10 a.m. This distinction creates a critical question of fact necessitating the denial of defendants' motions for summary judgment. The evidence is undisputed that neither Sheriff Hassinger nor Sgt. Bauman attempted to inform, let alone informed, Mark of the existence of an arrest warrant against him or even the fact that Mark's home was surrounded by the SWAT team.[11] If in fact the arrest warrant was not in existence during the early morning hours (2:10 a.m.) of July 25, 2003, then the district court should not have heard defendants (especially Officer Grice) argue good faith reliance on a facially valid arrest warrant.[12]

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[9] Otherwise, Mark would have been told "you're under arrest" immediately upon appearing at the door.

[10] It is important to note that a complaint was sworn out by Officer Grice in support of the issuance of an arrest warrant against Mark, and it was issued eventually. However, neither the complaint nor the warrant itself was time-stamped.

[11] "An officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995).

[12] The Sixth Circuit Court of Appeals, in its rush to adopt the entirety of findings of the district court, failed to address the issue of whether Officer Grice would be entitled to utilize reliance on the facial validity of the warrant that he secured after making admittedly false statements therein.

The masks, combat fatigues and guns worn by the SWAT team to conduct the "dynamic entry" of a private home do not remove their conduct from the purview of Fourth Amendment standards of reasonableness. As the Tenth Circuit eloquently put it:

> The SWAT designation does not grant license to law enforcement officers to abuse suspects or bystanders, or to vent in an unprofessional manner their own pent-up aggression, personal frustration or animosity toward others. If anything, the special circumstances and greater risks that warrant 'dynamic entry' by a SWAT team call for *more* discipline, control, mindfulness, and restraint on the part of law enforcement, not less. SWAT officers are specially trained and equipped to deal with a variety of difficult situations, including those requiring a swift and overwhelming show of force. At all times, SWAT officers no less than others--dressed in camouflage or not--must keep it clearly in mind that we are *not* at war with our own people. *Holland*, at 1194-1195 (Emphasis in original).

The Sixth Circuit, in the case at bar, erred in finding that under *Graham's* reasonableness test, and considering the totality of the circumstances in a light most favorable to Petitioners, the force utilized against Petitioners could not have been found to be excessive by a jury. As such, Petitioners respectfully request that the decision below be reversed and Petitioners be granted their day in court.

Conclusion

Petitioners request that a *writ of certiorari* be granted in the case at bar in order for these important constitutional issues to be clarified and uniformly applied.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-3118

[Filed February 24, 2006]

SHERRY OVERHOLT and MARK OVERHOLT,	)
Plaintiffs-Appellants,	)
v.	)
MONTVILLE TOWNSHIP et al.,	)
Defendants-Appellees.	)

Before: MARTIN, NORRIS, and DAUGHTREY, Circuit Judges.

OPINION

PER CURIAM.

The plaintiffs, Sherry and Mark Overholt, appeal from the district court's order granting summary judgment to the defendants in this civil action for unlawful search and seizure and use of excessive force under 42 U.S.C. § 1983, and for

intentional infliction of emotional distress and assault and battery under state law. The defendants, Montville Township and three members of the Montville Police Department (collectively, the Montville defendants), Medina County, the Medina County Sheriff and Medina County SWAT members "John Doe" and "Janet Doe" (collectively, the Medina defendants), defended on the basis that the search warrant and the arrest warrant that the Montville officers executed at the home of the plaintiffs were facially valid; that the arresting officers and the SWAT members used no more force than was necessary to arrest Mark Overholt, who was named in the warrants; that Sheriff Hassinger had no part in the use of force against the plaintiffs and could not be held liable on a theory of respondent superior; and that the township and the county were not shown to have incurred liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The plaintiffs now appeal the judgment of the district court, which ruled in the defendants' favor on all claims.

On appeal, the plaintiffs first contend that the district court erred "by denying numerous motions for the extension of factual discovery deadlines and a Fed. R. P. 56(f) motion [sic] after an amended complaint was filed." The Medina defendants question our jurisdiction to review the district court's rulings on the discovery motions, citing the requirement in Federal Rule of Appellate Procedure 3(c)(1)(B) that a notice of appeal must "designate the judgment, order, or part thereof being appealed." They point out that the notice of appeal does not reference any of the interim orders entered by the district court other than "the final judgment entry set forth in the District Court's Memorandum of Opinion and Order of December 30, 2004 granting summary judgment to the Defendants." We have held, however, that "an appeal from a final judgment draws

into question all prior non-final rulings and orders." *Crawford v. Roane*, 53 F.3d 750, 752 (6th Cir. 1995). We therefore conclude that the district court's rulings on the discovery motions are subject to review under the notice of appeal filed by the plaintiffs in this case.

Upon review of those rulings, however, we find no abuse of discretion in the district court's decisions. An order denying the plaintiffs' motion to extend the time for discovery, dated January 12, 2004, notes that the plaintiffs had failed to demonstrate why such an extension is necessary or to "give any explanation as to why it will not be possible to complete . . . discovery by March 22 [2004]," the discovery deadline set by the magistrate judge. As to the plaintiffs' other extension motions and motions to compel, the district court carefully considered each, denying in part and granting in part, and finding in at least one instance that the motion did not comply with Federal Rule of Civil Procedure 56(f). As to none of these decisions do we find an abuse of discretion that would require us to set aside the district court's entry of final judgment.

Because the search warrant was facially valid, the district court held that defendants could not be charged with an illegal search and seizure in the execution of the warrant. The court also found that the officers who effected Mark Overholt's arrest used objectively reasonable force under the circumstances, and that there was no excessive force used against Sherry Overholt. Citing a lack of evidence, the district court found in addition that there was no basis for holding that the county and the township were liable. Because the state law claims were dependent upon a finding of unreasonable or excessive force, the district court entered summary judgment on those claims as well.

Having had the benefit of oral argument, and having studied the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in dismissing the complaint. Because the reasons why judgment should be entered for the defendants have been fully articulated by the district court, the issuance of a detailed opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court upon the reasoning set out by that court in its order dated December 29, 2004.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 1:03 CV 1469

[Filed December 29, 2004]

SHERRY OVERHOLT, *et al.*,	)
	)
Plaintiffs	)
	)
v.	)
	)
MONTVILLE TOWNSHIP, *et al.*,	)
	)
Defendants	)
	)

JUDGE SOLOMON OLIVER, JR.

ORDER

On January 13, 2004, Plaintiffs Sherry Overholt ("Ms. Overholt") and Mark Overholt (Mr. Overholt) (together, the "Plaintiffs" or "Overholts") filed an Amended Complaint against Defendants Montville Township ("Township"), Officer Terry P. Grice ("Officer Grice"), Sgt. Derek A. Bauman ("Sgt. Bauman"), Officer Chris Ryba ("Officer Ryba"), Medina County ("County"), Sheriff Neil Hassinger

("Sheriff Hassinger"), unnamed members of the Special Weapons and Tactics Team ("SWAT Team"),[1] and other unnamed entities and people. The Complaint alleges various violations of federal and state law arising out of the execution of a search warrant at Plaintiffs' residence and adjoining business property in the early morning of July 25, 2002.

Now pending before the court is a Motion for Summary Judgment (EFC No. 50) filed by Defendants County and Sheriff Hassinger (together, "Medina Defendants") and a Motion for Summary Judgment (ECF No. 58) filed by Defendants Township, Officer Grice, Sgt. Bauman, and Officer Ryba (together, "Montville Defendants"). For the reasons discussed below, the Medina Defendants' Motion is granted and the Montville Defendants' Motion is granted.

I. FACTS

On the evening of July 24, 2002, Officer Grice of the Montville Police received a report from three individuals, Tyson Combs, Wayne Reinke, and Melanie Plues, who stated that Mr. Overholt had fired a handgun toward them while

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[1] In Plaintiffs' initial Complaint (ECF No. 1), Plaintiffs named the "Medina County Swat Team" as a Defendant. However, on November 13, 2003, this court granted Defendant SWAT Team's motion for judgment on the pleadings, (ECF No. 22), because the SWAT Team is a subunit of Medina County and not a legal entity subject to suit. In Plaintiffs' Amended Complaint, they name "SWAT Team Member John Doe" and "SWAT Team Member Janet Doe" as Defendants. However, Plaintiffs never filed a Second Amended Complaint or any other papers with the court to name these Defendants. Accordingly, "SWAT Team Member John Doe" and "SWAT Team Member Janet Doe" are dismissed from this suit.

they were at Mr. Overholt's business, Tiger General, in Montville Township. Mr. Overholt admits that he "fired [his] .357 magnum revolver three times in the air," (M. Overholt Dep. at 126), but argues that he was "evicting" these individuals from his property. Officer Grice took written statements from the individuals and then contacted Assistant Medina County Prosecutor Anne Eisenhower ("Ms. Eisenhower"), and advised her of the report. Ms. Eisenhower recommended that Officer Grice file felonious assault charges against Mr. Overholt and secure a search warrant of Mr. Overholt's premises in order to obtain the gun used in the shooting, along with any other evidence of the alleged crime.

Ms. Eisenhower prepared an affidavit for Officer Grice to support the requested search warrant. (Montville Def.'s Mot. for Summ. J., Attach. #1.) Officer Grice stated, under oath, that his belief that felonious assault had been committed by Mr. Overholt on July 24, 2002, was based on the following facts:

a) At approximately at [sic] 8:30 p.m. affiant, was advised of a shots fired complaint by three individuals. These individuals then reported to the Montville Police station in order to make a report.
b) That these three persons Tyson Combs, Wayne Reinke, and Melanie Plues executed sworn written statements that Mark Overholt, had fired a black pistol at them, on the property located at 6867 and 6881 Wooster Pike, Medina Ohio.
c) That the three above mentioned persons said that Mark Overholt also threatened Wayne Reinke, by saying he would "blow his fucking head off". That Mark Overholt also threatened Tyson Combs saying "to fucking leave before he kills someone".

d) That Mark Overholt then fired a black small long barreled pistol at them, and in their direction repeatedly.
e) That Tyson Combs, Wayne Reinke, and Melanie Plues were on the property of said Mark Overholt with his permission for the purpose of working on a demolition derby car. That Mark Overholt had given them permission to work on the property last week. And that they were lawfully on the property.
f) That evidence of Felonious Assault may still be on the property at 6881 and 6761 Wooster Pike, Medina.

(*Id.*) Officer Grice then presented the affidavit to Medina County Common Pleas Judge Christopher J. Collier ("Judge Collier").

Based on the affidavit, Judge Collier issued a search warrant to enter Mr. Overholt's residence and business to search for and seize the gun, along with any other firearms, weapons, contraband, and clothing worn by Mr. Overholt that evening. Concurrently, Officer Grice filed with the Deputy Clerk of the Medina Municipal Court a sworn complaint stating that Mr. Overholt had committed the offense of felonious assault in violation of R.C. § 2903.11. Based upon the complaint, the Medina Municipal Court Deputy Clerk issued a warrant for the arrest of Mr. Overholt for felonious assault. Because the Montville Police believed, based on the alleged shooting incident involving the three visitors to Mr. Overholt's property, that it might be dangerous to enter and search Mr. Overholt's property, Officer Ryba contacted the Medina County SWAT Team and requested its assistance; Montville Police's ranking officer at the time, Sgt. Bauman, concurred with this request. The request was fielded by Sgt.

Stephen Herte ("Sgt. Herte") of the Medina County Sheriff's Office, the team leader of the SWAT Team, and approved by Sheriff Hassinger of the Medina County Sheriff's Office. Sheriff Hassinger ordered a variance from standard SWAT Team procedure because he believed that following standard procedure was likely to result in injury or death to the officers. Accordingly, he decided to try to talk to Mr. Overholt before storming the house, in the hope that he could persuade Mr. Overholt to cooperate in the execution of the search warrant.

On the morning of July 25, 2002, at approximately 2:10 a.m., Sgt. Bauman and Sheriff Hassinger knocked on Plaintiffs' front door, requesting to speak with Mr. Overholt. Ms. Overholt answered the door, then went to wake up Mr. Overholt. Ms. Overholt returned indicating that Mr. Overholt did not wish to speak to the officers. Sheriff Hassinger repeated his request to speak with Mr. Overholt and Ms. Overholt again left. This time, Mr. Overholt came into the hallway and informed Sgt. Bauman and Sheriff Hassinger that he would speak with them the following morning. Mr. Overholt returned to his bedroom and Ms. Overholt headed toward the kitchen.

The officers determined at that time that they should proceed to arrest Mr. Overholt.

According to Sgt. Herte, "It was due to weapons being involved in the search warrant, the conduct of Mr. Overholt that led to the issuance of the warrant, and concerns that there were weapons in the bedroom that I gave the order for the Medina County SWAT Team to make entry." (*Id.*) Consequently, Sgt. Bauman, Officer Ryba, Officer Grice, and the Medina County SWAT Team forcefully broke into the Overholts' back door. Plaintiffs allege that a SWAT Team

member violently shoved and forced Ms. Overholt to get down on the ground, injuring her cheek and shoulder. Plaintiffs also allege that the officers pointed guns at Mr. Overholt while Sgt. Bauman and a SWAT Team member pushed him to the floor, causing multiple bruises on his body and a broken toe. Defendants argue that they only used the amount of force necessary to subdue the Overholts.

After the Overholts' residence was secured, Officer Ryba and Officer Grice entered and conducted the search pursuant to the warrant. During the search, they located nine firearms in the bedroom, including two loaded handguns located in nightstands on either side of the bed.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.... The Court may permit affidavits to be supplemented or opposed by depositions, answers

> to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or a otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 447 U.S. 317 (1986).

In reviewing summary judgment motions, the court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Whitev. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-944 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and

on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-1480 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

III. LAW AND ANALYSIS

A. Federal Claims Arising Under 42 U.S.C. § 1983

The court will first address Plaintiffs' § 1983 claims. As an initial matter, this court notes that Plaintiffs' claims have been directed against multiple defendants, not all of whom were directly involved in the various activities alleged by Plaintiffs. It is well-settled that personal involvement is a prerequisite to liability under § 1983. *See, e.g., Bennett v. Batchik*, 743 F. Supp. 1245, 1252 (E.D. Mich. 1990) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). Consequently, Plaintiffs' claims against many of the Defendants fail simply because of a lack of personal involvement.

1. Liability of Sheriff Hassinger, Officer Grice, Sgt. Bauman, and Officer Ryba

a. Count I: Illegal Search and Seizure

Plaintiffs allege that the individual Defendants are liable in their personal capacity for violating the Plaintiffs' rights protecting them from unlawful searches and seizures. (Pl.'s Compl. at ¶ 16.) Sheriff Hassinger, Officer Grice, Sgt. Bauman, and Officer Ryba move for summary judgment on the ground that they were executing a facially valid search warrant.

The Fourth Amendment states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and its central requirement is one of reasonableness. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting U.S. Const. amend. IV). A plaintiff, however, cannot base a Fourth Amendment claim on action taken pursuant to a valid warrant. *See, e.g.*, *Baker v. McCollan*, 443 U.S. 137, 143-44 (1979) (stating that someone executing a valid arrest warrant is not "required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent"). Defendants do not challenge the validity of the search warrant in this case.[2] Further, even if the validity of the warrant were in question, police officers executing search warrants are entitled to

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[2] Mr. Overholt challenged the validity of the search warrant in the state criminal proceedings against him and that court upheld the warrant's validity. He does not renew his objection to the search warrant in these proceedings.

qualified immunity if a reasonable officer would have believed that the execution of the warrant did not violate any clearly established law. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Saucier v. Katz*, 533 U.S. 194, 194-95 (2001). In this case, Defendants searched Plaintiffs' residence for evidence of an earlier crime as authorized by a valid search warrant. There is no evidence that they had any reason to believe that the warrant was invalid or otherwise suspect.

This court finds that Defendants were executing a valid search warrant and thus are shielded from Plaintiffs' claim that they conducted an illegal search and seizure. Accordingly, both the Montville Defendants' and Medina Defendants' Motions for Summary Judgment are granted on Count I of Plaintiffs' Complaint as to Defendants Sheriff Hassinger, Officer Grice, Sgt. Bauman, and Officer Ryba.

b. Count II: Unreasonable Force

Plaintiffs next allege that the individual Defendants unlawfully used excessive force on the morning of July 25, 2002, in violation of Plaintiffs' constitutional rights. (Pl.'s Compl. at ¶ 23.) Defendants move for summary judgment, arguing that the use of force was reasonable under the circumstances. For the following reasons, the court finds Defendants' Motions to be well-taken.

The *Graham* Court instructs that a test of reasonableness must be used to assess any use of force by police officers:

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F. 2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness

> must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-97. In addition, when determining the reasonableness of the force used, courts should pay particular attention to "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396; *see also Darrah v. City of Oak Park*, 255 F.3d 301, 307 (6th Cir. 2001).

In the instant case, the Defendants were executing valid search and arrest warrants. Mr. Overholt was accused of firing a gun at people on his property and the officers believed that he had weapons located on the premises. Plaintiffs admit that Mr. Overholt "informed Defendants Bauman and Hassinger that he would speak with them in the morning and turned around and began walking towards his bedroom." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 3.) At this point, Defendants were worried that he might access the weapons and begin shooting at the officers. The two people who were physically involved in subduing Mr. Overholt, Sgt. Bauman and a member of the SWAT Team, forced Mr. Overholt onto the ground and handcuffed him. Mr. Overholt has admitted to putting up a "resistance" and "struggling with the officers." (M. Overholt Dep. at 134.) As for Ms. Overholt, she has admitted that when the SWAT officers told her to get down on the floor, she initially disobeyed and instead sat in a rocking chair. (S. Overholt Dep. at 141.) It was only after being ordered onto the ground a second time that she complied although she did testify that

"one of the SWAT officers had some contact with [her] cheek." (*Id.*) There is no genuine issue as to any of these facts.

As stated above, § 1983 liability only attaches to actors who are "personally involved" in the allegedly unconstitutional activity. Therefore, Sheriff Hassinger, Officer Grice, and Officer Ryba cannot be liable because they had no physical contact with either of the Overholts. Furthermore, this court finds that the force used by Sgt. Bauman and the SWAT Team member was objectively reasonable. The officers were executing the warrant at nighttime in order to mitigate the chances that violence would result. Regarding the forced entry of the SWAT Team, the Supreme Court has held that "although the standard generally requires the police to announce their intent to search before entering closed premises, the obligation gives way when officers 'have a reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile.. . .'" *United States v. Banks*, 540 U.S. 31, 36 (2003). Additionally, the Defendants had evidence that Mr. Overholt had fired a weapon at three individuals the previous day and that he possessed weapons on the premises. Thus, it is objectively reasonable that they would want to intercept Mr. Overholt before he was able to reach that room. Regarding the handcuffing of Mr. Overholt, the Sixth Circuit, in *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002), concluded that officers did not use excessive force when they used force to subdue a suspect who "'twisted and turned some' when they tried to handcuff him" causing the officers to have difficulty restraining him. *Id.* at 944.

With regard to Ms. Overholt, Plaintiffs have offered no evidence that after Ms. Overholt refused to cooperate during the course of the search, Defendants used more force than

was necessary to force her to comply with their request. *See, e.g., Michigan v. Summers*, 452 U.S. 692, 705 (1981) (holding that "[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."). Furthermore, the limited evidence that Ms. Overholt offers in support of her injuries does not show that they were especially serious.

Therefore, the court finds that there is no genuine issue of material fact and that Defendants are entitled to judgment as a matter of law as to Plaintiffs' § 1983 claim of excessive force against the individual officers. Accordingly, both the Montville Defendants' and Medina Defendants' Motions for Summary Judgment are granted on Count II of Plaintiffs' Complaint as to Defendants Sheriff Hassinger, Officer Grice, Sgt. Bauman, and Officer Ryba.

2. Liability of County and Township

The court now addresses Plaintiffs' § 1983 claims against the municipalities, Medina County and Montville Township. Count I, Illegal Search and Seizure, alleges that Defendants County and Township: (1) have no policy concerning the manner in which the SWAT Team is used; (2) have an official policy and/or custom of violating the rights of subjects of searches; and (3) have failed to train their officers properly in the execution of search and arrest warrants. (Pl.'s Compl. at ¶ 14.) Count II, Unreasonable Force, alleges that Defendants County and Township: (1) have no policy regarding the use of force; or (2) have an official policy of using excessive force on the subjects of searches and arrests; or (3) have failed to train their officers on the use of force. (Pl.'s Compl. at ¶ 21.) County and Township move for summary judgment on Plaintiffs' § 1983 claim of illegal

search and seizure. The court finds Defendants' Motions to be well-taken.

A municipality or county cannot be liable under § 1983 absent an underlying constitutional violation by its officers. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). The court has found that there was no underlying constitutional violation committed by the agents of either County or Township. Thus, there can be no constitutional violation attributed to the municipalities themselves. Accordingly, both the Montville Defendants' and Medina Defendants' Motions for Summary Judgment are granted on this claim as to Defendants County and Township.

The court notes that even if there were a valid § 1983 claim against the individual Defendants, Plaintiffs have utterly failed to put forward any evidence that would trigger municipal liability. A municipality cannot be held vicariously liable under § 1983 for the acts of its employees or agents. *See Monell*, 436 U.S. at 694; *Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir. 2000). Rather, municipal liability attaches only where a constitutional violation results from the "execution of a government's policy or custom." *Gregory*, 220 F.3d at 441. Establishing municipal liability based on policy or custom requires proof of two basic elements: (1) that there actually is a municipal policy or custom; and (2) a direct causal link between the municipal policy or custom and the deprivation of federal rights. *See, e.g., Monell,* 436 U.S. at 694.

a. Existence of Policies or Customs

As an initial matter, the Plaintiffs bear the burden of showing that any of the policies they allege are actually City policy or custom, and are a "deliberate choice" by the

municipality to follow a course of action. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Plaintiffs advance a number of theories to establish these policies existed, all of which are without merit or lack evidentiary support.

First, Plaintiffs argue that County's and Township's "failure to train police officers and/or SWAT Team members resulted in conduct which deprived Plaintiffs of their constitutional rights since such failure amounted to 'deliberate indifference' to the rights of Plaintiffs whom the police and SWAT Team cam [sic] in contact with." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 8.) However, Plaintiffs offer absolutely no evidence of this "failure to train" and cannot rest on bare allegations at the summary judgment phase. Accordingly, they have not established an official policy or custom on this ground.

Second, Plaintiffs argue that

> based on prior experiences with county and township police and officials, along with other information and/or belief from other sources, Defendants Montville and Medina County either do not have rules, regulations or policies regarding the proper use of force, or if they do, they do not follow same in their every day official activities and thus have a custom or official policy of trampling on the constitutional rights of its residents.

(Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 9.) Again, Plaintiffs do not provide any evidence in the record before the court, beyond the bare allegations in their pleadings, that Defendants do not have any rules or regulations regarding the proper use of force. Accordingly,

they have not established an official policy or custom on this ground.

Third, Plaintiffs argue that

> Montville does not have a policy, or if they do it is their policy not to follow it, with regards to the following: (I) procurement of search warrants and arrest warrants; (ii) determining whether a SWAT team would be assembled and called upon for help in the execution of search and/or arrest warrants; (iii) reviewing affidavits prepared by the County Prosecutor in connection with obtaining search warrants to be conducted in the nighttime prior to signing them; and (iv) performing follow-up investigations.

(Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 10.) In support of these claims, Plaintiffs offer just that "Defendants Grice and Ryba admit that Defendant Montville does not have a written or verbal policy regarding the procedures, protocol and appropriateness of seeking the help of Defendant Medina County's SWAT Team." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 14.) However, Plaintiff has presented no evidence that Township's lack of a policy regarding when to seek the help of the Medina County SWAT Team rises to the level of a constitutional violation. The fact that Defendants might not have called for the use of the SWAT Team in other situations involving dangerous arrests is not sufficient to establish an unconstitutional official policy or custom. (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 13). Furthermore, Plaintiffs have offered no evidence that the lack of such a policy caused Defendants to violate their constitutional rights. Likewise, Plaintiffs fail to offer any

proof of their statements and thus have not established an official policy or custom on this ground.

The court will address the final five of Plaintiffs' claims together. Plaintiffs's fourth argument is that "Montville does not have any policy, procedure or guideline with regards to actually documenting, investigating and reporting complaints or injuries suffered by citizens during officers' execution of arrest or search warrants. . . . If a custom regarding same does exist, it was not taught to the officers and undersigned counsel has not been given a copy of it." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 12.) Fifth, Plaintiffs argue that "[t]he officers are also not aware, nor is there a policy, of the fact that they need a good faith belief that a crime is ongoing before they should seek a nighttime search warrant." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 12.) Sixth, Plaintiffs argue that "Montville Officers, especially Ryba, are not even aware of any policies that Montville has with regards to the execution of search warrants." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 13.) Seventh, Plaintiffs argue that "[s]ince the officers do not have procedures that would guide them, or if the procedures do exists [sic] the officers have a policy not to follow same, the Overholts' constitutional rights are in jeopardy without any means of actually vindicating same." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 13.) Finally, Plaintiffs argue that "[o]ther than basic police training, Defendant Montville does not provide, let alone require, any training regarding securing and/or executing search warrants, nor does it have any procedures in place regarding proper utilization of a SWAT Team." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. at 15.) For each of these claims – with the exception of the claim regarding the SWAT Team which the court disposed of above – Plaintiffs offer absolutely no proof of these statements. As stated

above, Plaintiffs may not rest on their bare allegations. They must offer proof of their claims at the summary judgment phase. They have not done so and thus have not established an official policy or custom on any of these grounds.

b. Policies or Customs as Moving Force

Even if Plaintiffs were able to establish an official policy or custom, in order to affix liability, they must also demonstrate that the government policy or custom was the "moving force" behind the injury alleged. That is, Plaintiffs must demonstrate a direct causal link between the municipal action or policy and the deprivation of federal rights. *See Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997); *see also City of Canton,* 489 U.S. at 385 ("Our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.").

In their brief in opposition to the motion for summary judgment on this issue, Plaintiffs have provided no evidence that even if such policies existed, that they were the moving force behind the alleged violations of the rights of plaintiffs. In order to support a claim against a municipality on failure to train, one must show the specific deficiencies in the municipality's training policies which were manifested in the officer's conduct. The *Canton* court held "for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury." *City of Canton,* 489 U.S. at 390. Additionally, a failure to train claim must demonstrate that the failure to train constituted deliberate indifference to the rights of those who come into contact with the employee. *E.g., Sargi*, 70 F.3d at

912. In *Lewis v. Irvine*, 899 F.2d 451 (6th Cir. 1990), the Sixth Circuit wrote:

> In *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989), the Supreme Court formally recognized the failure to train theory, but restricted its application to cases "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." *Id.* at ___, 109 S. Ct. at 1204. "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the City, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at ___, 109 S. Ct. at 1206. "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *Id.* at ___, 109 S. Ct. at 1206.

Id. at 455 (footnote omitted). Plaintiffs have put forward no evidence of "deliberate indifference" on the part of the City and, consequently, cannot sustain their burden of asserting a claim against the City for failure to train its officers sufficiently. Nor have Plaintiffs pointed to the specific deficiencies in the training program that led to their injuries. Therefore, Plaintiffs have not shown evidence that the failure to train was Township's or County's policy, or evidence of how such an alleged policy injured them. This court thus finds that Plaintiffs have not alleged sufficient facts to establish Township's or County's vicarious liability under § 1983 for the acts of its employees or agents. Therefore, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' Motions for Summary Judgment on Plaintiffs'

federal claims against the Defendants Township and County are granted.

B. State Law Claims

Plaintiffs' third cause of action sets forth a claim for intentional infliction of emotional distress against the Defendants Sheriff Hassinger, Sgt. Bauman, Officer Ryba, and Officer Grice. Plaintiffs' fourth and fifth claims allege assault and battery against these officers. Defendants move for summary judgment as to all of these claims. For the following reasons, Defendants' Motions are well-taken.

1. Count III: Intentional Infliction of Emotional Distress

Plaintiffs allege that the conduct of the Defendants violated their "right to feel safe in their own home and feel safe in general," (Pl.'s Compl. at ¶ 28), and Defendants' actions "resulted in the violation of such right and was intentional and/or reckless in nature, as well as being extreme and outrageous, being of a nature that was rife with unlawful conduct, which resulted in the infliction of emotional distress upon Plaintiffs Sherry and Mark." (Pl.'s Compl. at ¶ 29.) Defendants argue that Plaintiffs' claims fail as a matter of law because Plaintiffs have no evidence demonstrating all of the elements of intentional infliction of emotional distress. The court agrees.

Under Ohio law, to establish a claim for intentional infliction of emotional distress, a plaintiff must show: (1) that the actor either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress to the plaintiff; (2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it could be

considered as "utterly intolerable in a civilized community"; (3) that the actor's actions were the proximate cause of plaintiff's psychological injury; and (4) that the mental anguish suffered by the plaintiff was serious and of a nature that "no reasonable man could be expected to endure it." *Yeager v. Local Union 20*, 453 N.E.2d 666, 671 (1983).

In this case, Plaintiffs fail to provide sufficient evidence of an essential element of the claim: "extreme and outrageous" conduct by the Defendants. This court has found that Defendants' conduct during the search was objectively reasonable. Thus, as a matter of law, Defendants' conduct was not "beyond all possible bounds of decency" such that it could be considered as "utterly intolerable in a civilized community." *See, e.g., Wells v. City of Akron*, 537 N.E.2d 229, 232 (Ohio Ct. App. 1987) (holding that there was no "extreme and outrageous" conduct when an officer conducting a search said, "Do as you're told or I'm going to blow your head off."). As stated above, summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Here, Plaintiffs will bear the burden of proof at trial; therefore, they are required to establish all of the essential elements to a claim for infliction of emotional distress. The conclusory allegations contained in Plaintiffs' Complaint are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 343 (6th Cir. 1993).

Plaintiffs' Third Count might also be read as arising under the laws governing reckless infliction of emotional distress. However, such a claim still fails for the same reason that the claim for intentional infliction of emotional distress fails:

Plaintiffs have not demonstrated "extreme and outrageous" conduct by the Defendants. *Yeager*, 453 N.E.2d at 671. Therefore, since Defendants' conduct was not extreme and outrageous, but rather it was objectively reasonable, Plaintiffs are unable to establish one of the necessary elements for a claim of reckless infliction of emotional distress. *See, e.g.*, *Brandenburger v. Hilti, Inc.*, 556 N.E.2d 212, 221 (Ohio Ct. App. 1989).

Accordingly, Defendants' motions for summary judgment on Plaintiffs' claims of intentional and/or reckless infliction of emotional distress are well-taken.

2. Counts IV-V: Assault and Battery

Plaintiffs allege that the officers committed an assault and battery against them. Defendants move for summary judgment on these counts.

Assault is defined as "the wilful threat to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact; the threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact." *Smith v. John Deere*, 614 N.E.2d 1148, 1154 (Ohio 1993). To be liable for the tort of battery, the actor must know with certainty that the act in which he is engaging will bring about harmful and/or offensive contact. *Id.* Generally, a police officer is not liable for an injury inflicted upon a suspect when he is using reasonably necessary force to overcome any resistance in the act of his duties. *State v. Sells*, 30 Ohio Law Abs. 355 (Ohio Ct. App. 1939). Further a police officer may, in a civil action

for assault and battery allegedly occurring during an investigatory stop, utilize as a defense that it is within his duty to use the necessary force to subdue and arrest potential lawbreakers. *State v. Yingling*, 44 N.E.2d 361, 366 (Ohio Ct. App. 1942). Further, in Ohio, it is standard practice for the courts to follow the principles enunciated by the United States Supreme Court, however, Ohio courts will generally afford a police officer the utmost protection when he acts in good faith. *In Re Pickering*, 266 N.E.2d 248, 255 (Ohio Ct. App. 1970).

In this case, Plaintiffs have not put forth sufficient evidence to establish a case of assault or battery. First, as to Ms. Overholt, it is undisputed that none of the individual Defendants had any physical contact with her. She claims that it was a SWAT Team member not named as a defendant herein – and not Sheriff Hassinger or Officer Grice or Sgt. Bauman or Officer Ryba – who had some contact with her cheek. Consequently, she cannot maintain claims of assault and battery against any of the Defendants. With respect to Mr. Overholt, his assault and battery claims are without merit. Neither Sheriff Hassinger, nor Officer Grice, nor Officer Ryba had any physical contact with him. Furthermore, Mr. Overholt has offered no evidence in support of the conclusion that Sgt. Bauman used force beyond that which was necessary to effectuate the arrest. *See, e.g.*, *Strickland v. Tower City Mgmt. Corp.*, 1997 WL 793133, *5 (Ohio Ct. App. Dec. 24, 1997) (rejecting a claim for assault and battery even when police officer "slammed" suspect against a wall because it was necessary to effectuate arrest).

This court thus finds that there is no genuine issue of material fact and that Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' Motions for

Summary Judgment are granted as to the claims of assault and battery.

IV. CONCLUSION

For the foregoing reasons, the court finds that there is no genuine issue of material fact and that the Medina Defendants and the Montville Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims. Accordingly, the Medina Defendants' Motion for Summary Judgment (ECF No. 50) is granted and the Montville Defendants' Motion for Summary Judgment (ECF No. 58) is granted.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

December 29, 2004

(2)

No. 05-1507

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SHERRY OVERHOLT, *et vir.*,

Petitioners,

v.

MONTVILLE TOWNSHIP, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR MEDINA COUNTY RESPONDENTS

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QUESTION PRESENTED

Petitioners Sherry and Mark Overholt assert a variety of claims related to the execution of a search warrant at their residence and adjoining business property in the early morning of July 25, 2002. But, Medina County and Medina County Sheriff Neil Hassinger (Medina County Respondents) had only limited involvement in the events about which the Overholts complain.

Sheriff Hassinger's involvement was simply that he approved the use of the SWAT Team to secure the premises, and he went to the Overholts' door to seek the cooperation of Mr. Overholt, whose conduct in discharging a firearm at or near persons had led to the issuance of the search warrant. The Sheriff's purpose in going to the door, although doing so exposed him to danger, was to try to prevent any exchange of gunfire and to avoid serious injury for all concerned, both the Overholts and the law enforcement officers. Medina County had no direct involvement; it had been sued based upon the alleged conduct of Sheriff Hassinger and the SWAT Team members.[1] Notably, despite Mr. Overholt's unwillingness to cooperate and his conduct that posed a serious threat to all who were present, Sheriff Hassinger's purpose to avoid serious injury to the officers and the Overholts was achieved.

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1. The Overholts never filed an amended complaint or any other papers with the district court to name John Doe SWAT Team members. Accordingly, the district court dismissed those defendants. (Pet. at 6a n.1.) No argument has been made that the ruling was erroneous.

The District Court of the Northern District of Ohio granted summary judgment in favor of the Medina County Respondents and the Township Co-Respondents. Upon Petitioners' appeal, the United States Court of Appeals for the Sixth Circuit in an unpublished decision unanimously concluded that, "the issuance of a detailed opinion . . . would be duplicative and would serve no useful purpose." The sixth circuit affirmed the district court's decision "upon the reasoning set out by that court." (*See* Pet. at 4a.)

This Petition raises the following question:

1. Did the Sixth Circuit commit reversible error when it affirmed summary judgment in favor of the Medina County Respondents as to Petitioners' claim of excessive force, when the undisputed evidence established that Sheriff Hassinger did not physically touch either of the Overholts and the Overholts failed – by their own admission – to demonstrate that Respondent Medina County had an unconstitutional policy of any kind?

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STATEMENT OF THE FACTS

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio accurately stated the pertinent, undisputed facts relevant to the Overholt's claims. (Pet. at Apx. "A" 1a-4a and Apx. "B" 5a-28a.) For this Court's convenience, the Medina County Respondents provide the following.

On July 24, 2002, at approximately 11:20 p.m., Sgt. Stephen Herte of the Medina County Sheriff's Office ("the Sheriff's Office"), the team leader of the SWAT Team, was contacted by telephone by Officer Ryba of the Montville Township Police Department. Officer Ryba requested the SWAT Team to assist his department with executing a search warrant at the residential and business properties of the Overholts ("the Overholt Premises"). Officer Ryba advised that Mr. Overholt had discharged a handgun at/near people earlier in the day, which led to a search warrant being obtained. Sgt. Herte instructed the Sheriff's Office Dispatch to contact Sheriff Hassinger with this request, and the Sheriff approved the available SWAT Team members to assemble.

Sheriff Hassinger approved the use of the SWAT Team at the Overholt Premises on July 25, 2002, after he reviewed the warrant for a nighttime search that had been obtained by the Montville Township Police, signed by Medina County Common Pleas Court Judge Collier ("the Search Warrant"),[2] and after he was briefed on the nature of the incident that led to the issuance of the Search Warrant, which involved allegations that Mr. Overholt had discharged a firearm

2. The search warrant was facially valid, which had been admitted by the Overholt's below.

multiple times and in the direction of individuals on the Overholt Premises earlier that night (on July 24, 2002). Reasons for requesting the assistance of the SWAT Team included, but were not limited to, the presence of weapons, the presence of uninvolved people, the behavior of an involved person, the criminal record of an involved person, and the speed at which a location needed to be secured.

However, Sheriff Hassinger ordered a variance from standard SWAT Team procedure, because he sincerely believed – and still does sincerely believe – that following the standard procedure was likely to result in injury, or even death, of one or more of the Overholts and/or law enforcement officers. Specifically, he believed that, if the SWAT Team made a sudden entry into the Overholt Premises, Mr. Overholt would initiate gunfire against the entering officers, which would have resulted in a return of gunfire in the direction of Mr. Overholt and possibly Mrs. Overholt. The Sheriff also believed that if he were able to talk with Mr. Overholt, who knows him and knew him then, he could persuade Mr. Overholt to cooperate regarding the execution of the Search Warrant. Therefore, Sheriff Hassinger decided to go to the door for the purpose of making contact with Mr. Overholt. The leader of the SWAT Team opposed this plan, but only because of the danger it posed to Sheriff Hassinger.

At approximately 1:20 a.m. on July 25, 2002, the SWAT Team departed from the Sheriff's Office for the Overholt Premises. After the SWAT Team members took their positions, Sheriff Hassinger and Sgt. Bauman of the Montville Township Police Department went to the front door of the residence at approximately 2:05 a.m. Mrs. Overholt came to the door, and Sheriff Hassinger informed her that he needed to speak with Mr. Overholt. Mrs. Overholt told Sheriff

Hassinger and Sgt. Bauman to "come in." A short while later, Mr. Overholt entered the front hallway, coming from a back room. Mr. Overholt took several steps down the hallway, turned around, stated "this can wait till the morning," and started back towards the back room.

Despite Sheriff Hassinger's hope to avoid a sudden entry by the SWAT Team, when Mr. Overholt failed to comply with Sheriff Hassinger's verbal orders to talk with him in the front hall of the Overholt residence and instead moved back toward the Overholt's bedroom, where it was believed that firearms were located, Mr. Overholt's actions posed a threat to the persons present. At that point, therefore, Sgt. Herte gave the order to make entry. Sgt. Herte gave the order for the SWAT Team to make entry because of weapons being involved in the Search Warrant, the conduct of Mr. Overholt that led to the issuance of the warrant, and concerns that there were weapons in the bedroom.

SWAT Team members assisted only in securing the Overholt Premises and the persons on the premises. Specifically, "Alpha" members of the SWAT Team entered through the front door, through the hallway, and into the back room, which was the master bedroom, where they secured Mr. Overholt after a short physical altercation. Sheriff Hassinger was present during, but not physically involved in, the taking into custody and handcuffing of Mr. Overholt by Sgt. Bauman and one of the SWAT Team members. During that process, Mr. Overholt was struggling with the two officers against being handcuffed, and Sheriff Hassinger encouraged him to stop resisting and instead to cooperate. Only the minimum amount of force necessary to take Mr. Overholt into custody was used. "Bravo" members of the SWAT Team breached the rear door. The rest of the residence

then was checked for any persons other than Mr. and Mrs. Overholt, but none was found. Mr. Overholt was escorted to a small bench in the hallway and released to Sgt. Bauman. The remaining buildings on the Overholt Premises were also checked for any persons and secured; no other persons were found. The premises were then turned over to members of the Montville Township Police Department for execution of the Search Warrant. The SWAT Team departed at approximately 2:30 a.m.

No SWAT Team member participated in the execution of the Search Warrant. When the Search Warrant was executed, at least one firearm was located in the Overholts' bedroom. Indeed, the firearm that Mr. Overholt shot on July 24, 2003, was located in the bedroom.

At no time did either Sheriff Hassinger or Sgt. Herte observe any injury to Mr. or Mrs. Overholt, nor did they hear either of them complain of any injury or observe any other conduct by either of them that would indicate an injury had occurred.

CLARIFICATION OF THE RECORD

Pursuant to Sup. Ct. R. 15.2, Respondents object to the Overholt's representations that the parties in this case involve "numerous county . . . officers, as well as the county's SWAT Team members." (Pet. at 6; *see also* Pet. at ii.) The only Medina County Respondents are Sheriff Hassinger and Medina County itself. The Overholts claim that SWAT team members were wearing masks, and "Petitioners were unable to identify which officers caused their injuries. This was, ostensibly, the reason the district court failed to address the SWAT Team member's liability." (Pet. at 20 n.7.) The district

court, in fact, did address the unnamed SWAT Team member's liability. The individual SWAT Team members were never properly named in the suit, despite their identities being known through written discovery. (Pet. at 6a n.1.) As the district court held, "In Plaintiffs' Amended Complaint, they name 'SWAT Team Member John Doe' and 'SWAT Team Member Janet Doe' as Defendants. However, Plaintiffs never filed a Second Amended Complaint or any other papers with the court to name these Defendants. Accordingly, [those Defendants] are dismissed from this suit." (Pet. at 6a n.1.) The Overholts do not argue that the unnamed SWAT Team members were erroneously dismissed.[3]

These Respondents object to the suggestion that the Sheriff apologized to Mr. Overholt as tantamount to some acknowledgment of wrongdoing on his part. The Sheriff's comments to Mr. Overholt were simply that the situation was unfortunate – nothing more.

REASONS FOR DENYING THIS PETITION

1. The Overholts have not articulated a "compelling" reason for this Court's discretionary review as to Respondent Medina County.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. This case poses no "compelling reason" for review.

The Overholt's first question deals exclusively with Montville Township's purported failure to document citizen

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3. The Petitioners did not take the depositions of the SWAT Team members involved that night, despite the disclosure of their identities through written discovery.

complaints of constitutional violations. (*See* Pet. at 7.) Medina County Respondents are not mentioned. In fact, as to entity liability, the Overholts acknowledged that they had no evidence of the County's liability and do not argue here the County is liable. As the district court properly observed, "even if there were a valid § 1983 claim against the individual Defendants, Plaintiffs have utterly failed to put forward any evidence that would trigger municipal liability." (Pet at 18a.) If the Overholts suggest that Medina County could be held vicariously liable, they are incorrect. The law is established that an entity cannot be held liable simply on a theory of *respondeat superior*. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691-95 (1978).

2. The Overholts have not articulated a "compelling" reason for this Court's discretionary review as to Sheriff Hassinger.

The Overholts argue that this Court should review this case presumably because the lower courts improperly decided an important federal question. Specifically, the Overholts state that this Court has "not previously considered whether personal involvement for Section 1983 liability requires actual physical contact or resulting physical injury." (Pet. at 17.) Not only is this statement untrue, but the statement also indicates a fundamental misunderstanding of the *Graham* test.

a. No important federal question is implicated.

Despite the Overholt's assertion, this Court has considered the issue of "actual physical contact" in the seminal case of *Graham v. Connor*, 490 U.S. 386 (1989). In setting out the controlling analysis for excessive force claims,

this Court indicated that actual physical touching was not necessary to establish the threshold requirement of a seizure of the person. Rather, "[a] 'seizure' . . . occurs only when government actors have, 'by means of physical force **or show of authority**, . . . in some way restrained the liberty of a citizen' " *Id.* at 395 n.10 (emphasis added). Physical contact is similarly not required to demonstrate the unreasonableness of the force used to effect a particular seizure. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 395.

"The test of reasonableness [of force] under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396, *citing Tennessee v. Garner*, 471 U.S. 1 at 8-9 (1985). The question is whether the **totality of the circumstances** justifies a particular sort of seizure. (*Id.*) The analysis of excessive force claims under Section 1983 is well established and should not be revisited here.

Physical contact is a component – very typically an essential component – of the excessive force inquiry under *Graham*. The lower court's treatment of the issue of physical contact is merely one aspect of the totality of the circumstances inquiry. But, "the ultimate question is 'whether the totality of the circumstances justifies a particular sort of seizure." *Graham*, 490 U.S. at 396. In this case, the Sheriff's lack of personal involvement was undoubtedly a central factor. Despite the Overholt's representations, nothing indicates that the lower courts misapplied the proper law under *Graham*.

b. No conflict exists.

The Overholts also suggest that there is a conflict among the circuits as to whether physical contact is required to establish an excessive force claim. There is no conflict.

The Overholts cite to case law that finds that the absence of physical contact may be a determining factor in analyzing the use of force. (Pet. at 20.) The Overholts also cite to other case law that finds that the lack of physical contact does not constitute a determining factor. (Pet. at 21.) The reason that these cases pose no real conflict should not be surprising: Direct physical contact is merely a **factor** in the totality of circumstances test under *Graham*.

In other words, in some cases the lack of direct physical contact – as is the case here – may be dispositive of the excessive force inquiry. *See, e.g., Burnette v. Gee*, 137 Fed. Appx. 806, 810 (6th Cir. 2005) (sheriff charged at plaintiff does not constitute excessive force as there was no physical contact) [cited in Pet. at 20]. In other cases, that may not be true. For example, in *Martin v. Board of County Comm. of County Pueblo*, 909 F.2d 402, 406 (10th Cir. 1990) the court affirmed the denial of summary judgment on an excessive force claim that involved no direct physical contact. [Cited in Pet. at 21-22.] The defendant officers allegedly knew that a plaintiff could suffer paralysis should she be moved from the hospital without the assistance of a gurney or wheelchair. Nevertheless, the officers forced the plaintiff to walk to a van, climb in, ride to jail, make her way inside and then sit for an hour without medical attention. The officers argued that they could not be held liable because they did not actually strike the plaintiff. The court rejected this argument and determined a claim for excessive force could lie.

The instant dispute is not such a case. The facts are undisputed that Sheriff Hassinger did not touch, did not verbally threaten, and did not physically threaten the Petitioners. The Sheriff merely approved the Township's use of the SWAT team. In fact, the Sheriff did not give the order for the entry of the SWAT team. The Sheriff, at risk to himself, tried to talk with the Overholts to consent to a search before Mr. Overholt rejected his efforts and began to go back to his bedroom where it was believed to be – and, in fact, were – loaded firearms.

c. The Sheriff's lack of physical contact is one of several reasons the courts below granted summary judgment.

The Overholts rely on the district court's reference to Sheriff Hassinger having "no physical contact with either of the Overholts" as dispositive of Petitioners' claim that he should be liable for using excessive force. (Pet. at 17.) While Respondents believe that to be true in this case, the district court and the sixth circuit **also** determined that Sheriff Hassinger could not be held liable for the additional reasons that the force used by the Township Defendants and the SWAT team members was otherwise objectively reasonable and therefore not a violation of the Fourth Amendment. Finally, the lower courts also found that the Sheriff would be immune under the doctrine of qualified immunity. So, even assuming that this Court were to look favorably upon the Overholt's claim of a circuit conflict, qualified immunity would also provide an independent ground for affirming the lower courts' decisions. In that event, this Court would be issuing a purely advisory opinion.

3. The lower courts did not err in granting summary judgment to the Medina County Respondents.

The lower courts properly authorized summary judgment in favor of the Medina County Respondents. Failing to demonstrate a convincing legal reason for this Court to grant certiorari, Petitioners argue that the lower courts simply misapplied the facts to the law. This claim is insufficient to warrant this Court's review. Supreme Court Rule 10 ("a petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Moreover, four judges unanimously agreed (district court judge and three-judge appellate panel) that the law was accurately applied to the facts of this case.

Sheriff Hassinger acted in a constitutionally reasonable manner and did not violate clearly established law. An excessive force claim is analyzed under Fourth Amendment "reasonableness" standards. *Graham v. Connor* (1989), 490 U.S. 386, 394-97. A plaintiff must prove that the conduct at issue was objectively "unreasonable." *Id.* The Supreme Court has made clear that the reasonableness test under the Fourth Amendment "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Courts must bear in mind that "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the Fourth Amendment, and "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

As courts have consistently observed:

> [U]nder *Graham [v. Connor, supra]*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

E.g., *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (brackets added).

There is no dispute that the Medina County Respondents were executing a facially valid search warrant.[4] There also is no dispute that Mr. Overholt was accused of firing a gun at people on his property and that officers on the scene believed that he had – and actually did – have weapons located on the premises. Mr. Overholt told Sheriff Hassinger that he was not going to speak with the officers and turned around and began walking toward his bedroom. The officers had a very real concern that Mr. Overholt may access weapons that were believed to be in – and actually were in – his bedroom. In a footnote, Petitioners state that "there was no reason for defendants to be concerned about Petitioners' or

4. Petitioners argue that Township Officer Respondent Grice purportedly "lied to the county judge in getting the night search warrant issued, and . . . an arrest warrant was attested to and issued by the clerk of court prior to 2:10 a.m." While there is no evidence of that being the case, the Overholts have not argued that the Medina County Respondent knew of this purported "lie."

other's safety and defendants admit that Petitioners had no history of violence." (Pet. at 23 n.8.) Viewed without the benefit of 20/20 hindsight and in light of the allegations that Mr. Overholt had fired his weapon at other persons the day before, the Overholts cannot demonstrate – and could not demonstrate to the lower courts – that the officer's conduct was "objectively unreasonable."

Further, there is also no dispute that Mr. Overholt admitted to putting up "resistance" and "struggling with the officers." Mrs. Overholt also disobeyed the officers when told to get down on the floor, she instead sat in a chair. In light of the defiant actions of the Overholts combined with the dangers previously stated, the officers on the scene cannot be said to have acted objectively unreasonably.

The doctrine of qualified immunity holds that an individual officer cannot be held liable for bad guesses in the gray areas; they are liable for transgressing bright lines." This Court has construed qualified immunity protection to shield "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). In this case, even with the benefit of hindsight, it cannot be reasonably said that the officers even made a "bad guess." Rather, the officers – specifically Sheriff Hassinger – acted prudently for the safety of all involved. In fact, Sheriff Hassinger tried to avoid the use of a sudden entry all together by using his personal relationship with the Overholts to convince them to comply with the search.

The Overholts claim that, "it cannot be argued that any officer in charge would not anticipate that the SWAT Team would utilize excessive force if activated." (Pet. at 24.) To suggest that simply authorizing the use of a SWAT team automatically means "excessive" force would be used is simply wrong. The Overholts fail to cite to any case in support of that overly broad claim. The Overholts do rely on the Tenth Circuit case of *Holland v. Harrington*, 268 F.3d 1179 to support the contention that the mere authorization of a SWAT team is tantamount to excessive force. (Pet. at 23-26.) But, the *Holland* case holds that the decision to deploy a SWAT team did not violate a constitutional right. In fact, the *Holland* court reversed the district court's denial of summary judgment on that very claim. The Overholt's citation to that case not only fails to support their claim, but demonstrates the propriety of the lower courts' holdings in this case. The Overholts fail to establish any reason – let alone a compelling reason – to review this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

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